an understanding is reached, reduce it to writing and sign it. The bargaining unit is:

All employees at the Palo Alto store excluding lumber handlers, outside contract salesmen, truckdrivers, lift-truck drivers, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL offer to Wilbert Bentley, Harry Engman, William McBrearty, and Burnell Walker, immediate and full reinstatement each to his former or substantially equivalent position, without prejudice to seniority or other rights and privileges, and will make each of them whole for any loss of earnings suffered by reason of discharge.

WE WILL NOT by unlawfully refusing to bargain or by means of discriminatory discharges or in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to join or assist Retail Store Employees Union, Local 428, Retail Clerks International Association, AFL–CIO, or any other labor organization, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

MERNER LUMBER AND HARDWARE COMPANY,
Employer.

Dated_____ By_____
(Representative) (Title)

NOTE.—We will notify the above-named employees if presently serving in the Armed Forces of the United States of their right to reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 830 Market Street, San Francisco, California, Telephone No. Yukon 6–3500, Extension 3191, if they have any question concerning this notice or compliance with its provisions.

Whiting Milk Corporation *and* Martin M. Walsh *and* Lester J. O'Neil

Milk Wagon Drivers & Creamery Workers Union, Local 380 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Martin M. Walsh *and* Lester J. O'Neil. *Cases Nos. 1–CA–3921, 1–CA–4118, 1–CB–796, and 1–CB–838. January 16, 1964*

DECISION AND ORDER

On June 20, 1963, Trial Examiner Fannie M. Boyls issued her Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. Thereafter, the Respondents filed exceptions to the Intermediate Report and supporting briefs, and the General Counsel filed a brief in support of the Intermediate Report.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with these cases to a three-member panel [Chairman McCulloch and Members Fanning and Brown].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. These rulings are hereby affirmed. The Board has considered the Intermediate Report and the entire record in these cases, including the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions.[1]

As set forth more fully in the Intermediate Report, Respondent Whiting and Respondent Union have for many years been parties to a multiemployer contract known as the Milk Industry Agreement. At all times relevant here, the parties' contracts have contained a provision numbered as clause 70 in earlier versions but now referred to as clause 81, which, *inter alia*, provides in substance that if any employer party acquires or merges with "another Union Company," the preexisting seniority of the employees of the acquired company shall be preserved and integrated with the seniority of the employees of the acquiring company. The term "Union Company" is construed by the parties as meaning an employer whose employees have been represented by the Respondent Union.

On or about June 1, 1961, Respondent Whiting acquired White Milk Company. The latter had theretofore operated five plants in Massachusetts. At four of them, the employees had been represented by Respondent Union.[2] At the fifth, located in Hyannis, the employees had been unrepresented. Following Whiting's acquisition, the former White employees at all five plants were incorporated into the unit of Whiting employees covered by the Milk Industry Agreement, the employees of the previously unrepresented Hyannis plant being regarded as an accretion to that unit. However, in conformity with clause 81, as construed by the parties, the former White employees at the four represented plants were accorded preferred seniority status over those at the previously unrepresented Hyannis plant. The employees in the first group were treated as carrying their White seniority over to Whiting. The Hyannis employees, on the other hand, were treated for seniority purposes as if they were newly hired employees.

The Charging Parties, Martin Walsh and Lester O'Neil, were among the employees who had worked at White's Hyannis plant before its acquisition by Whiting. As employees who had not theretofore been members of the Union, they were subordinated to other former White employees on Whiting's companywide seniority roster. Walsh and O'Neil suffered no adverse effects from their placement at the bottom of Whiting's seniority list for a period of more than 6 months thereafter.

[1] We deny the Respondents' request for oral argument because, in our opinion, the record, exceptions, and briefs adequately set forth the positions of the parties.

[2] The Agreement contained a union-security clause requiring membership in the Union.

Subsequently, however, they were each laid off on two occasions. But for clause 81, which required Whiting to place their names at the bottom of the companywide seniority list and thereafter to maintain their inferior status on that list, they would not have been laid off at all. That their selection for layoff was substantially related to their earlier lack of membership in the Union was reaffirmed by Whiting at the time of such action. As found by the Trial Examiner, the Hyannis plant manager, when laying off Walsh and O'Neil, made statements to the effect that their replacements had been in the Union longer than they had and that if Walsh and O'Neil had joined the Union while working for White, they could not have been selected for layoff.

1. The complaint in this case is based on charges filed September 19, 1962, less than 6 months after the initial layoff referred to above. The Trial Examiner found, and we agree, that Respondent Union and Respondent Company violated Section 8(b)(1)(A) and (2) and Section 8(a)(1) and (3) of the Act, respectively, by continuously maintaining and giving effect since March 19, 1962, to the contract seniority system, specifically clause 81, which on its face requires discrimination against employees because of their prior lack of representation by Respondent Union.[3]

2. The Trial Examiner further found, and we likewise agree, that Respondents violated the same sections of the Act by the layoffs of Walsh and O'Neil pursuant to the unlawfully maintained seniority system required by clause 81 of the contract.

Respondents contend that Section 10(b) operates as a bar to any violation finding as to these layoffs because Walsh and O'Neil were first subjected to the terms of the discriminatory seniority provision—though not to the actual operation thereof which effectively disrupted their employment tenure—when they were first placed on this discriminatory seniority roster more than 6 months prior to the filing of charges giving rise to this proceeding.

We reject that contention. The seniority roster on which Walsh and O'Neil were placed prior to the 10(b) period was dependent upon, and had no durability or binding force of its own apart from, the contractual provision which required it.[4] The Charging Parties' continued discriminatory retention on the seniority roster, which otherwise might have been corrected, was *compelled* by the uninterrupted maintenance of the illegal contract term within the 10(b) period. The selection for layoff of Walsh and O'Neil also within the 10(b) period thus resulted from the enforcement of the unlawfully maintained seniority provision.

[3] *International Association of Machinists, Aeronautical Industrial Lodge 727 et al. (Menasco Manufacturing Company)*, 123 NLRB 627, 629, enfd. as modified 279 F. 2d 761 (C.A. 9), cert. denied 364 U.S. 890.

[4] *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 53, footnote 21.

Our finding of a violation need not, and does not, depend on a subsidiary finding that Respondents engaged in a time-barred unfair labor practice. Wholly apart from any such earlier unfair labor practice, it is sufficient to spell out a violation here that the layoffs of Walsh and O'Neil were directly attributable to the application within the 10(b) period of an unlawfully maintained discriminatory contract provision. Here, as in the closely parallel *Potlatch Forest* case,[5] which was cited with apparent approval by the Supreme Court in the *Bryan Manufacturing* case [6] and which we regard as square authority for the holding we make, Respondents' conduct during the barred period has been considered merely for the purpose of bringing into clearer focus the current conduct which, even without reliance on any earlier unfair labor practice, supports a finding of statutory violation in the layoffs.

The cases relied upon by Respondents do not weaken the force of our holding. The *Bryan* case [7] involved the enforcement and maintenance of a contractual provision—a union-security clause—which was *lawful on its face*, but which had been unlawfully entered into more than 6 months before the charges were filed. The union-security clause in that case could be found discriminatory only on the basis of a finding of an unfair labor practice in the initial execution of the contract during the barred period. Here, on the contrary, the Charging Parties were laid off by reason of a discriminatory seniority policy that was compelled by a then-existing contractual provision which was *unlawful on its face*, making it unnecessary to go outside the contract itself, and its application at that time to spell out unlawful discrimination. The record shows, moreover, that the discriminatory character of the layoff selections was contemporaneously reaffirmed by the explanation given therefor by the Hyannis plant manager, as more particularly noted above. The *Bowen* case is equally distinguishable.[8] There, unlike the situation in the instant case, the layoff was effected under a contract which was concededly *lawful on its face* and was not under attack. The only basis on which a violation might have been found was to rest the decision on a time-barred finding of earlier discrimination in the seniority placement of the laid-off employee. The majority in *Bowen* was careful to note the absence of an unlawful contractual provision compelling such continued discrimination, distinguishing that case from *Potlatch* on the ground that in *Potlatch*, as in the instant case, "the discriminatory seniority policy [that was being applied] . . . was . . . unlawful on its face and continuing in nature." [9]

[5] *Potlatch Forests, Inc.*, 87 NLRB 1193, 1210, enf. denied on other grounds, 189 F 2d 82 (C.A. 9)

[6] *Sub nom., Local Lodge No 1424, International Association of Machinists* v. *N.L.R.B.*, 362 U.S. 411, 419, 420.

[7] *Ibid*

[8] *Bowen Products Corporation*, 113 NLRB 731.

[9] *Id.* at 733.

In short, in *Bowen*, unlike *Potlatch*, "the gravamen of the unfair labor practice complained of lay in a fact or event occurring in the barred period"—a distinction the validity of which the Supreme Court expressly recognized in *Bryan*, *supra*.[10] The layoff violations we find in the instant case arise, as in *Potlatch*, from the application and enforcement within the 10(b) period of a seniority provision which was both unlawful on its face and was at the time unlawfully maintained.

ORDER

The Board adopts as its Order the Trial Examiner's Recommended Order with the following modifications:

1. Substitute the following for the provisions of the Recommended Order preceding subparagraph A:

> Upon the entire record in these cases and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Whiting Milk Corporation, its officers, agents, successors, and assigns, shall:

2. Substitute the following for the paragraph of the Recommended Order immediately preceding subparagraph B:

> Upon the entire record in these cases and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Milk Wagon Drivers & Creamery Workers Union, Local 380, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, representatives, and agents, shall:

[10] 362 U S. 411, 424.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon charges dated September 19, 1962, filed by Martin M. Walsh, an individual, against the Respondent Whiting Milk Corporation (herein called Respondent Company or Whiting) and the Respondent Milk Wagon Drivers & Creamery Workers Union, Local 380, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called Local 380 or Respondent Union), respectively, a consolidated complaint was issued on December 18, 1962. Each Respondent filed an answer to the complaint. Thereafter, on March 11, 1963, a new charge was filed against both Respondents by Lester O'Neil, an individual. A hearing was commenced at Boston, Massachusetts, on March 13, 1963, before Trial Examiner Thomas S. Wilson. Prior to the taking of any testimony, however, the General Counsel moved to amend the complaint to cover the matters alleged in the new charge. The Trial Examiner permitted the amendment but adjourned the hearing to March 26 to afford Respondents adequate time to prepare their defense to the complaint, as amended. The complaint as thus amended alleged that Respondent Union and Respondent Company had violated Section 8(b)(1)(A) and (2) and Section 8(a)(1) and (3) of the National Labor Relations Act, respectively, by maintaining in effect and enforcing an unlawful contract provision and by discriminatorily effecting the layoffs of the two Charging Parties, Martin M. Walsh and Lester J.

O'Neil. Each Respondent filed an answer in which it denied the commission of the unfair labor practices alleged and set up certain affirmative defenses which will be described hereinafter.

A hearing on the consolidated amended complaint and Respondents' answers thereto was held on March 26 through 29 and on April 3 and 4, 1963, before Trial Examiner Fannie M. Boyls, duly designated to hear the matter in the place of Trial Examiner Wilson who had become unavailable for the adjourned hearing. All parties were represented and afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument, and to file briefs before me.[1] Counsel for both Respondents argued orally before me and counsel for all the parties thereafter filed briefs which I have carefully considered.

Upon the entire record in this case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT COMPANY

The Respondent Company is a Massachusetts corporation, having its principal office and place of business in Quincy, Massachusetts. It operates plants at Quincy, Hyannis, and a number of other locations in the Commonwealth of Massachusetts, at which it is engaged in the processing, sale, and distribution of milk and related products. In the course and conduct of its business, it annually receives products and materials valued in excess of $1,000,000 at its principal place of business in Massachusetts from points outside the Commonwealth. Respondent Company concedes, Respondent Union does not dispute, and I find that Respondent Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE RESPONDENT UNION

The parties concede and I find that Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The issues*

Respondent Union and Respondent Company have for many years been parties to a Milk Industry Agreement. Also parties to this contract were White Brothers Milk Company (herein called White) and a number of other milk companies in Massachusetts. Following the acquisition on June 1, 1961, by Respondent Company of the five plants of White, the seniority and category service of employees of the four White plants which had theretofore been represented by Respondent Union were merged with those of Respondent Company's employees so that their status on Respondent Company's seniority lists was the same as it would have been had they been employed by Respondent Company from the beginning of their service with White. This integration of seniority and category service was required under the Milk Industry Agreement.

One of the White plants, that at Hyannis, had never been represented by Respondent Union or, so far as the record shows, by any other labor organization. White and Respondent Union had not regarded it as covered by the Milk Industry contract. Following its acquisition by Respondent Company, however, both Respondents treated it as an accretion to the companywide unit or units and the employees of that plant, at least for layoff and bumping purposes, were regarded as new employees and placed at the bottom of the companywide seniority lists. Because they were thus placed at the bottom of the seniority lists rather than credited with seniority and category service on the same basis accorded White's former employees in the organized plants, two of the former White-Hyannis employees—the Charging Parties—were bumped by employees from other plants and laid off in April 1962, and on subsequent occasions.

Within 6 months after the first layoffs but more than 6 months after fixing of the employees' seniority status on the companywide seniority rosters, charges were filed and served on Respondents alleging discrimination against Martin M. Walsh and other former White-Hyannis employees. Unless, therefore, the fixing of seniority status and consequent layoffs were pursuant to a provision of the Milk Industry contract which required unlawful discrimination and which continued in effect within the period protected by the limitations proviso to Section 10(b) of the Act,

[1] At the commencement of the second day of the adjourned hearing, the Respondent Company substituted new counsel, Samuel Leiter, for its original counsel, Leon A. Green.

or unless, independently of the contract, conduct of Respondents within the Section 10(b) period may evidence a discriminatory motivation in the selection of the Charging Parties for layoff, no statutory violation may be found.[2] The General Counsel contends that on both counts, a violation of Section 8(b)(1)(A) and (2) by Respondent Union and of Section 8(a)(1) and (3) by Respondent Company has been proven. Respondents defend the validity of their contract and deny that any statutory violation has occurred but contend that if any unlawful discrimination ever occurred, it was at the time the seniority status of the Charging Parties was fixed in 1961 and that any unfair labor practice finding based upon the action then taken by Respondents is time-barred.

B. *The applicable contract*

For many years there has been a trend in the milk industry, at least in Massachusetts, for milk companies to merge or sell out their businesses and the smaller milk companies, in particular, have been steadily declining in number. As a result of the acquisitions and mergers, routes have been consolidated and the number of employees in the industry has diminished. This situation appears to be a continuing trend. The problems presented in this proceeding, therefore, are of substantial importance in the milk industry. The Respondent Union and the employer parties to the Milk Industry Agreement, of which Respondent Company is one, have attempted to cope with problems presented by these mergers and acquisitions in their various collective-bargaining agreements over the years. The contract in effect at the time Respondent Company acquired White's plants and employees in June 1961 contained a clause 70, renumbered and appearing in the current contract (and herein referred to) as clause 81, which reads as follows:

> If the Company merges with or acquires, by any means, another Union Company, the seniority and category service of those affected by such action shall be deemed to have been established with the entity produced by such merger or acquisition. In an acquisition, unlike a merger, the right to displace an employee of the acquiring company through a route, bid-classification, or foremanship consolidation by an employee of the acquired company with the assertion of category service or seniority shall be disallowed until the anniversary of the acquisition. Seniority may be asserted to retain employment through a lack of work layoff.[3]

It is this provision which is alleged in the complaint to discriminate unlawfully against employees and prospective employees of Respondent Company on the basis of their prior lack of membership in or organization by Respondent Union.[4]

At the outset of the hearing and prior to the receipt in evidence of the entire Milk Industry Agreement, I stated that clause 81 appeared to me to be somewhat ambiguous and I permitted testimony by James Walsh, formerly director of labor relations and personnel for Respondent Company, who had negotiated the contract

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[2] *Local Lodge No 1424, International Association of Machinists, AFL–CIO, et al. (Bryan Manufacturing Co)* v. *N.L.R.B.*, 362 U.S. 411; *Bowen Products Corporation*, 113 NLRB 731.

[3] Clause 81 is one of several clauses under the general topic heading "Seniority." Another clause under that topic (clause 74) which may be helpful in understanding clause 81 reads

> Seniority shall be confined within the Departmental Branches, as defined herein, and shall commence with the date of Company employment within a covered category

[4] A prior contract in effect between April 1, 1957, and March 31, 1959, contained, in lieu of the above provision, a clause 114 which states:

> If the Company consolidates with or acquires another Union Company the seniority of the Union member affected by such action shall be deemed to have been established with the entity produced by the consolidation or acquisition.

Respondents proffered evidence, which was rejected, to the effect that in connection with the settlement of unfair labor practice charges based on allegations that this and other provisions of that contract were unlawful, the contract was revised to substitute the clause now challenged and that the substituted clause was approved by personnel in the Board's Regional Office. These assertions, if true, would not estop the Board from now proceeding on charges which attack the legality of the current clause and would not deprive employees of their right to remedial action if the clause is found illegal. *N.L.R.B.* v. *Armstrong Tire and Rubber Company*, 263 F. 2d 680, 682 (C.A. 5); *A.P.W. Products Co*, 137 NLRB 25, enfd. 316 F. 2d 899 (C.A. 2).

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in behalf of Respondent Company and other employers who signed it, as to his interpretation of clause 81. However, after carefully reading that clause in the context of the entire contract of which it is a part, I do not now regard it as ambiguous. The term "Union Company," appearing in the first sentence of this provision, read in the context of the contract—particularly the preamble, which recites that the Respondent Union is "hereinafter referred to as the 'Union' " and that the employer signatory to the contract is "hereinafter referred to as the 'Company' "—manifestly refers to an employer signatory to the contract with Respondent Union.[5] The challenged clause 81 accordingly requires that in the event one company who has signed the Milk Industry contract merges with or acquires another such company, the seniority and category service of employees of the two companies shall be "established by the entity produced by such merger or acquisition." In other words, the seniority of employees of the two companies would be integrated and the date of employment in a covered category by one of such companies would be counted as the date of employment in the entity produced by the merger or acquisition.

Respondent Company asserts that clause 81, on its face, is merely silent with respect to the treatment to be accorded employees of non-"Union Companies" which might be involved in a merger or acquisition and that such clause does not, therefore, require disparate treatment of employees of "Union Companies" and non-"Union Companies." The clear implication of clause 81, however, is that employees other than those of a "Union Company" shall not have their seniority or category service thus integrated with the seniority or category service of "Union Company" employees. Any integration of seniority or category service of employees from a non-"Union Company" would be inconsistent with the guarantee of clause 81 that employees of a "Union Company" would have their seniority and category service "established with the entity produced by such merger or acquisition" of "Union Companies." Employees covered by the contract had a right to expect that after such a merger or acquisition, they would, by reason of clause 81, have greater seniority than employees of a non-"Union Company" which a merger or acquisition might bring into the bargaining unit. Indeed, as Respondent Union suggests in its brief, it seems reasonable to conclude that any attempt by the acquiring "Union Company" or the merged "Union Companies" to integrate the seniority or category service of employees of such a non-"Union Company" so as to give them equal treatment, seniority wise, with acquired or merged "Union Company" employees, would be in breach of the contract.

The General Counsel contends that clause 81 by itself and in conjunction with clause 74 of the Milk Industry Agreement discriminates on its face "between Union and non-Union employees of the acquired companies." The Union, in its brief, seems to agree that premerger or preacquisition membership in Respondent Union—rather than prior organization by or representation by Respondent Union—is the basis for affording preferred treatment to employees. This is perhaps because the Milk Industy Agreement contains a union-shop provision and, for practical purposes, the distinction may appear to them as immaterial. I do not believe, however, that either the General Counsel or Respondent Union would contend that if a single employee in a plant not previously represented by Respondent Union happened to be a member of that Union, he would be treated differently than the nonmembers in the same plant after acquisition by a "Union Company." In any event, a careful reading of clause 81 in the context of the agreement convinces me that it is the prior representation by Respondent Union under the agreement which requires the preferred treatment here in issue.

The question, therefore, is whether the parties may lawfully contract to give such preferred treatment in the new employer entity to those employees whom Respondent Union represented prior to the acquisition or merger. Respondent Union argues that since seniority rights are not inherent and come into existence only by reason of contract or statute (*Trailmobile Company* v. *Whirls,* 331 U.S. 40), employees not covered by the Milk Industry contract had no lawful right to seniority with Respondent Company antedating their acquisition by Respondent Company and their coverage under the contract, whereas employees covered by the contract on the date of acquisition did by reason of such contract, have such seniority rights. This argument, it seems to me, begs the question. There can be no quarrel with the proposition that a union and employer may by contract grant seniority rights to employees represented by the Union and it may also be conceded that a union, as a general proposition, has the right, if not the duty, to get for those it represents the best contract it can. The fact that a union may, through bargaining, obtain more favorable terms for those it rep-

[5] This interpretation is confirmed by the testimony of Respondent Company's negotiator, James Walsh, as well as by the testimony of Luke Kramer, business agent for Respondent Union, who negotiated in the latter's behalf

resents than are enjoyed by employees for whom it is not the bargaining representative may encourage the latter to choose the Union as their bargaining representative but this is not the type of encouragement which the statute meant to outlaw. *Local 357, International Brotherhood of Teamsters, etc.* v. *N.L.R.B.* (*Los Angeles-Seattle Motor Express*), 365 U.S. 667, 675–676. The Union's right to obtain a good bargain for those it represents is not, however, without limitations. It may not include in its contract terms which impinge upon the statutorily protected rights of employees whom it does not represent, such as by precluding the latter through individual bargaining, or by other means, from obtaining comparable benefits for themselves.

Clause 81, here in issue, does, as I read it, preclude employees unrepresented by Respondent Union from obtaining comparable benefits for themselves. Because, as I have already demonstrated, that clause prevents Respondent Company from granting to employees not represented by Respondent Union prior to the merger or acquisition date seniority rights comparable to those it must, by reason of the contract, grant to those represented by Respondent Union prior to that date, it is vulnerable to attack. In thus creating superseniority rights for employees of "Union Companies," the clause necessarily interferes with the right of employees not to join or seek representation by Respondent Union. And by discriminating against those employees who, prior to a merger or acquisition, have exercised their statutorily protected right not to join Respondent Union, the clause inherently encourages membership of employees in Respondent Union.[6]

It is undisputed that this clause, which appeared in the contract in effect when Respondent Company acquired the White plants, was readopted in the current Milk Industry Agreement which, by its terms, is effective from April 1, 1962, until March 31, 1964.[7] I therefore find that by continuously maintaining clause 81 in effect subsequent to March 19, 1962, the Section 10(b) cutoff date, Respondent Union has violated Section 8(b)(1)(A) and (2) and Respondent Company has violated Section 8(a)(1) and (3) of the Act.

Even if, as Respondent Company asserts, clause 81 is merely silent on the question as to what seniority credit, if any, is to be accorded employees in the companywide bargaining units who were not members of or represented by Respondent Union prior to being employed by Respondent Company and even if it does not require that such employees be denied any seniority credit for service with their former employer, I would, nevertheless, conclude that the clause is discriminatory on the face of the contract. Respondent Company's argument that clause 81 guarantees to new employees previously represented by Respondent Union seniority credit for service with their former employer, but leaves open for negotiation at the time of acquisition the issue as to whether such seniority credit should be accorded to employees not previously represented by Respondent Union, is only another way of saying that the contract contemplates that disparate treatment, though not required, is permissible. Otherwise, there would be no occasion for negotiation on this point. Put a little differently, Respondent Company seems to be arguing that the contract clause says to one group of employees who come into the bargaining unit, "You are guaranteed seniority credit with Respondent Company for your past service with your former employer because you joined the Union and were represented by it prior to your employment with Respondent Company," and says to another group who come into the bargaining unit, "You are not guaranteed any seniority credit for your service with your past employer because you delayed joining the Union and being represented by it until now." Thus, even Respondent Company's interpretation of clause 81 would appear to make it discriminatory in that it guarantees to one group of employees, and not to another, certain benefits based solely on their past representation by Respondent Union.

Although in reaching the conclusion that clause 81 is unlawfully discriminatory I have considered that clause in conjunction with other provisions of the collective-bargaining agreement, I do not, of course, purport herein to pass judgment on the validity or invalidity of any other provision. Nor, indeed, do I purport herein to pass on the validity or invalidity of clause 81 in any respect except that alleged in the complaint and litigated at the hearing.

C. *The layoffs of Martin M. Walsh and Lester J. O'Neil*

As already indicated, White, prior to its acquisition by Respondent Company on June 1, 1961, operated five plants in different towns, four of which had been organized by Respondent Union and covered by the Milk Industry Agreement, and a

[6] Cf. *Radio Officers' Union etc.* v. *N.L.R.B.*, 347 U.S. 17, and *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221.

[7] The Agreement recites that it was ratified by the union membership on June 28, 1962.

fifth at Hyannis, Massachusetts, which was unorganized and treated as a unit separate and apart from the other plants and not covered by the contract. The parties, at the hearing, referred to White as being a "Union Company" insofar as the four organized plants are concerned and as a non-"Union Company" insofar as the Hyannis plant is involved, and I shall so regard them for purposes of this proceeding. The parties, on the other hand, have regarded the employees of all of Respondent Company's plants as belonging in companywide units.[8]

Shortly after the June 1 acquisition by Respondent Company, Respondent Union called a mass meeting of its members and explained to them the respective rights under the Milk Industry Agreement of the former White employees from the organized plants and the other organized Respondent Company employees. Within about 10 days or 2 weeks after the acquisition, union representatives also called a meeting of the employees at the unorganized White-Hyannis plant.[9] En route to the meeting these representatives, including Business Agent Kramer, rode in a car with Respondent Company's then director of labor relations and personnel, James Walsh. According to the latter's credited testimony, after the union agents had told him they were going to inform the White-Hyannis employees that, as required by the union contract, they would have to join Respondent Union in 30 days, he "asked the agents what their opinion was with respect to the seniority rights of the former White . . . employees at Hyannis, and it was thrown right back at [him], and [he] gave [his] opinion," which was to the effect that the White-Hyannis employees were not entitled to have their seniority with Respondent Company counted as of the beginning of their employment with White.[10]

The meeting with the employees was held in the score room of the plant. Labor Relations Director Walsh and Local Plant Manager Bennett withdrew from the meeting while union representatives addressed the employees. Among other things, Business Agent Kramer told them that because they had not joined the Union prior to the acquisition date, as they had a chance to do, their seniority with Respondent Company would not be counted from the date of their employment with White but would start with the date of acquisition, June 1. He explained that this "was according to the contract." Management representatives returned to the meeting before it was over and Labor Relations Director Walsh, upon being informed that union representatives had said that the employees' seniority would start as of June 1, confirmed the accuracy of this report. He assured the employees, however, that there was plenty of work for everyone and that instead of laying off any employees at Hyannis, he expected to employ more people.[11] I have no reason to doubt Walsh's

[8] In June 1962 the Board recognized the appropriateness of companywide units by directing an election in several of such companywide units composed of employees in different categories at all of Respondent Company's plants. These plants consisted of those operated by Respondent Company prior to June 1, 1961—a processing and distribution plant in Charlestown and distribution points in Marblehead, Watertown, Dorchester, Hyde Park, and Hyannis—as well as the plants acquired from White on June 1, 1961, consisting of a processing and distribution plant at Quincy and distribution points at Needham, Duxbury, Hyannis, and Truro. See *Whiting Milk Company*, 137 NLRB 1143

[9] Respondent Company, for a number of years prior to the acquisition, had also maintained a plant at Hyannis

[10] I do not understand Walsh's asserted reasons for his decision, for after first testifying that he had no argument about the Union's announced intention to require the former White-Hyannis employees to join the Union in 30 days because that was "provided within the contract," he further testified: "I told the Union Agents that in my opinion because [Respondent Company] had maintained a branch at Hyannis for a number of years, which was part of the contractual agreement with Local 380, and that because [White] had segregated their operations at Hyannis from all other locations where they had a union contract, that I felt it only fair, the only fair thing to do was to continue the practice of [White], and that in my opinion these men were not entitled to seniority back to date of employment with [White]. With this the Union agents concurred . . . ."

[11] The findings in the above paragraph are based upon the mutually corroborative and credited testimony of employees Martin Walsh, Lester O'Neil, and Luther Perkins Business Agent Kramer's version is to the effect that he told the employees that if they had been a part of the bargaining unit prior to the acquisition, their employment with White would be construed as employment with Respondent Company. I do not consider this as a substantial variance in the testimony of the witnesses, for I am convinced that in the context of the entire discussion, Kramer, whatever his precise words, was referring to the contract provision guaranteeing superseniority to employees of "Union Companies" and that the employees understood Kramer to be interpreting the contract. These occurrences prior to March 19, 1962, the Section 10(b) cutoff date, are considered only as background to shed light on the events occurring thereafter.

sincerity in making this statement and am convinced that he did not make it for the purpose of lulling the former White-Hyannis employees into a false sense of security and thereby inducing them not to file unfair labor practice charges at that time.

It was almost a year later, in April 1962, before any former White-Hyannis employee felt any adverse effect from the placement of his name at the bottom of the companywide seniority lists. Martin M. Walsh, an employee whose tenure at the White-Hyannis plant dated back to May 5, 1955, was laid off on April 10, 1962, when he was bumped by James Robinson, a former White-Quincy plant employee whose tenure dated back only to January 30, 1961. Walsh was recalled on April 22, 1962, but was laid off again on December 14, 1962, when bumped by John Pierce, a Respondent Company employee since June 11, 1960. Another former White-Hyannis employee, Lester J. O'Neil, whose tenure dated back to October 29, 1955, was laid off on April 21, 1962, when bumped by Sergio Almeida, a Respondent Company employee since April 3, 1961. O'Neil was recalled on June 6, 1962, for work during the summer season but was laid off again on October 28, 1962, and had not been recalled by the date of the hearing in March 1963.

When laying off employees Walsh and O'Neil, Hyannis Plant Manager Bennett made statements to the effect that their replacements had been in the Union longer than they had and that if Walsh and O'Neil had joined the Union while working for White they would not have been selected for layoff. These statements, as I view them, were mere reiterations of the fact, already known to the employees, that because of their lack of representation by the Union while employed by White, they, unlike the other former White employees who were so represented, were not given credit with Respondent Company for their prior service with White.

There is also testimony by Martin Walsh that Plant Manager Bennett, in January 1963, told him that he, Bennett, and Arnold Bullock, president of Respondent Company, had a telephone conversation that day in which both agreed that they wanted to give the former White-Hyannis employees their "full seniority" but that the Union would not permit it. This testimony stands uncontradicted in the record and I credit it. The statement of Bennett is hearsay as to Respondent Union, however, and I do not infer from Bennett's statement that Respondent Union was approached and expressed itself on the seniority issue on any occasions other than those already described. Bennett's statement to Walsh does indicate, however, that as late as January 1963 Respondent Company reconsidered its June 1961 decision with respect to seniority of the former White-Hyannis employees and would have been willing to modify that decision but for its assumption that the Union would not go along with such a change. In view of clause 81 of the Milk Industry Agreement, this was perhaps a reasonable assumption.

As I view the evidence, the layoffs of Walsh and O'Neil in April 1962 and thereafter occurred as a result of clause 81 of the Milk Industry Agreement which required Respondents discriminatorily to place Walsh and O'Neil and other former White-Hyannis employees at the bottom of the companywide seniority lists and continuously thereafter to maintain their inferior seniority status.[12] Because of the limitations proviso of Section 10(b) of the Act, I do not find Respondents' action in placing the employees at the bottom of the seniority lists in June 1961 to be an unfair labor practice. I do find, however, that Respondents' action in April 1962 and thereafter (within the Section 10(b) period) in laying off Walsh and O'Neil was the result of Respondents' continuous maintenance and enforcement of the unlawful contract provision and that Respondent Union thereby violated Section 8(b)(1)(A) and (2) and Respondent Company thereby violated Section 8(a)(1) and (3) of the Act.

In view of my finding above, based upon the illegality of clause 81 of the contract, I find it unnecessary to, and do not, decide whether, if that clause were not illegal on its face or on the face of the contract, conduct of either Respondent

[12] At the hearing, Respondents sought to show that prior to the acquisition date, employees at the White-Hyannis plant had no legally enforcible seniority rights I regard this factor as immaterial, however, for clause 81 in requiring an employer signatory to the contract to grant superseniority rights to employees represented by Respondent Union prior to an acquisition or merger, does not distinguish between other employees on the basis of whether they had any legally enforcible seniority rights with their former employer. Respondent Union concedes as much when it states in its brief: "Accordingly, as seniority is established by contract and is not inherent, it is clear that all non-Local 380 [Respondent Union] employees of the other company would have no contractual seniority rights upon a merger or acquisition. This group of non-Local 380 employees could include non-Union, Union or even members of another Teamster Local. In any event, if they do not belong to Local 380, they have no enforceable or contractual seniority rights."

during the Section 10(b) period might independently be construed as in violation of the statute.

One other contention made by the General Counsel calls for a ruling. He asserts that following the acquisition by Respondent Company of the White plants and employees, Martin Walsh and other former White-Hyannis employees were discriminatorily deprived of a right they previously enjoyed of selecting the time for their vacations on a seniority basis because they had not been members of Respondent Union as long as some other employees in their categories. The evidence on this point was inconclusive, but if there was any discrimination involved, it would seem to flow from the discriminatory fixing of the employees' seniority and category service status pursuant to clause 81 and the application of clauses 150 and 153 of the current Milk Industry Agreement which apparently permits preferences for vacation times on a seniority basis. A remedial order requiring the discontinuance of the discriminatory requirement with respect to seniority and category service status should also incidentally remedy any discriminatory treatment of employees with respect to their vacation choices.

CONCLUSIONS OF LAW

1. Respondent Union and Respondent Company have violated Section 8(b)(1)(A) and (2) and Section 8(a)(1) and (3) of the Act, respectively, by continuously, since March 19, 1962, maintaining and giving effect to a contract term which, on the face of the contract, requires discrimination against employees on the basis of their prior lack of representation by Respondent Union.
2. Respondent Company has violated Section 8(a)(3) and (1) of the Act by laying off employees Martin M. Walsh and Lester J. O'Neil pursuant to the requirements of an unlawfully discriminatory contract term, and Respondent Union has violated Section 8(b)(1)(A) and (2) of the Act by causing Respondent Company to lay off said employees.
3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents violated the Act, my Recommended Order will require them to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondents, since March 19, 1962, have maintained and enforced a provision in their collective-bargaining contract which unlawfully requires discrimination against employees not previously represented by Respondent Union at the time of a merger or acquisition, my Recommended Order will require that Respondents cease and desist from giving effect to this discriminatory feature of said provision and eliminate said provision from the contract or revise it so that it will not require disparate treatment of any employee on the basis of his premerger or preacquisition representation by Respondent Union. It will further be recommended that Respondent Company revise its seniority rosters so as to eliminate any element of discrimination against Respondent Company's present employees based upon the application of that unlawful provision. Although Walsh and O'Neil were the only employees shown by the record to have felt any adverse effect as a result of the application of the discriminatory contract provision, other employees who were working for non-"Union Companies" prior to their acquisition by Respondent Company were similarly situated and may feel such adverse effects in the future if the seniority rosters are not revised as herein required.

To remedy the discriminatory layoffs of Walsh and O'Neil, my Recommended Order will require Respondent Company to offer them reinstatement to the same employee status, rights, and privileges they would have enjoyed but for the discrimination against them.[13] Respondent Union, jointly with Respondent Company, will be required to make them whole for any loss of pay suffered by reason of such discrimination. Such backpay shall be computed on a quarterly basis, as provided by the Board in *F. W. Woolworth Co.*, 90 NLRB 289, and interest at the rate of 6 percent per annum shall be added. See *Isis Plumbing & Heating Co.*, 138 NLRB 716 and *Reserve Supply Corp.* v. *N.L.R.B.*, 317 F. 2d 785 (C.A. 2).

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that:

[13] Cf. *Filtron Company, Inc.*, 134 NLRB 1691, 1712, enfd. 309 F. 2d 184 (C.A. 2).

A. The Respondent Whiting Milk Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining or giving effect to any provision of a collective-bargaining agreement with Respondent Union which discriminates against any employee with respect to seniority or category service rights with Respondent Company on the basis of his prior lack of membership in or representation by Respondent Union.

(b) Encouraging membership of employees in Respondent Union by laying them off or otherwise discriminating in regard to their hire or tenure of employment or any term or condition of their employment on the basis of their prior lack of membership in or representation by Respondent Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Eliminate from its collective-bargaining agreement with Respondent Union any provision requiring preferential treatment of employees on the basis of their membership in or representation by Respondent Union prior to becoming employees of Respondent Company.

(b) Revise its seniority or category service rosters so as to eliminate any element of discrimination against its employees based upon whether they were members of or represented by Respondent Union prior to becoming employees of Respondent Company.

(c) Offer to Martin M. Walsh and Lester J. O'Neil immediate reinstatement to the same employee status, rights, and privileges they would have enjoyed but for the discrimination against them and, jointly and severally with Respondent Union, make them whole for any loss of earnings suffered as a result of such discrimination, all in the manner more particularly described in the section of the Intermediate Report entitled "The Remedy."

(d) Preserve and, upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all records necessary for the determination of the amount of backpay due under the terms of this Recommended Order.

(e) Post at each of its plants copies of the attached notice marked "Appendix A."[14] Copies of said notice, to be furnished by the Regional Director for the First Region, shall, after being duly signed by a representative of Respondent Company, be posted immediately upon receipt thereof in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Company to insure that said notices are not altered, defaced, or covered by any other material.

(f) Post at the same places and under the same conditions as set forth in (e) above, as soon as they are forwarded by the Regional Director, copies of the Respondent Union's attached notice marked "Appendix B."

(g) Notify the Regional Director for the First Region, in writing, within 20 days from the receipt of this Intermediate Report and Recommended Order, what steps it has taken to comply therewith.[15]

B. The Respondent Milk Wagon Drivers & Creamery Workers Union, Local 380, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining or giving effect to any provision of a collective-bargaining agreement with Respondent Company which discriminates against any employee with respect to seniority or category service rights with Respondent Company on the basis of his prior lack of membership in or representation by Respondent Union.

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[14] If this Recommended Order should be adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommended Order of a Trial Examiner" in the notice. If the Board's Order should be enforced by a decree of a United States Court of Appeals, the words "A Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "A Decision and Order."

[15] If this Recommended Order should be adopted by the Board, this provision shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith."

(b) Causing or attempting to cause Respondent Company to lay off or otherwise discriminate against any of its employees in violation of Section 8(a)(3) of the Act.

(c) In any like or related manner restraining or coercing employees of Respondent Company in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Eliminate from its collective-bargaining agreement with Respondent Company any provision requiring preferential treatment of employees on the basis of their membership in or representation by Respondent Union prior to becoming employees of Respondent Company.

(b) Jointly and severally with Respondent Company, make whole Martin M. Walsh and Lester J. O'Neil for any loss of pay suffered by reason of the discrimination against them, in the manner set forth in the section of the Intermediate Report entitled "The Remedy."

(c) Post at its offices, in conspicuous places, copies of the attached notice marked "Appendix B." [16] Copies of this notice, to be furnished by the Regional Director for the First Region, shall, after being duly signed by a representative of Respondent Union, be posted immediately upon receipt thereof and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to insure that these notices are not altered, defaced, or covered by any other material.

(d) Additional copies of this notice, to be furnished by said Regional Director, shall, after being signed by a representative of Respondent Union, be forthwith returned to the Regional Director for posting by Respondent Company, as required above.

(e) Post at the same places and under the same conditions as set forth above, as soon as they are forwarded by the Regional Director, copies of the attached notice marked "Appendix A."

(f) Notify said Regional Director, in writing, within 20 days from the receipt of this Intermediate Report, what steps have been taken to comply therewith.[17]

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[16] See footnote 14

[17] See footnote 15

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, you are notified that:

WE WILL NOT maintain or give effect to any provision of our collective-bargaining agreement with Milk Wagon Drivers & Creamery Workers Union, Local 380, which discriminates against any employee with respect to seniority or category service rights on the basis of his prior lack of membership in or representation by said union.

WE WILL NOT encourage membership of our employees in said union by laying them off or otherwise discriminating in regard to their hire or tenure of employment or any term or condition of their employment on the basis of their prior lack of membership in or representation by said union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist unions, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from such activities, except to the extent that such right may be affected by an agreement requiring union membership as a condition of employment, as authorized in Section 8(a)(3) of the National Labor Relations Act.

WE WILL eliminate from our collective-bargaining agreement with the Union any provision requiring preferential treatment of employees on the basis of their membership in or representation by the Union before becoming our employees.

WE WILL revise our seniority or category service rosters so as to eliminate any element of discrimination against our employees based upon whether they were members of or represented by the Union prior to being employed by us

WE WILL offer to Martin M. Walsh and Lester J. O'Neil immediate reinstatement to the same employee status, rights, and privileges they would have enjoyed but for our discrimination against them, and we will, jointly and severally with the Union, make them whole for any loss of earnings suffered by reason of the discrimination against them.

WHITING MILK CORPORATION,
Employer.

Dated_____ By_____
(Representative) (Title)

NOTE.—We will notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Boston Five Cents Savings Bank Building, 24 School Street, Boston, Massachusetts, Telephone No. Lafayette 3–8100, if they have any question concerning this notice or compliance with its provisions.

APPENDIX B

NOTICE TO ALL MEMBERS

Pursuant to a Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT maintain or give effect to any provision of our collective-bargaining agreement with Whiting Milk Corporation which discriminates against any employee with respect to seniority or category service rights with Whiting on the basis of his prior lack of membership in or representation by our Union.

WE WILL NOT cause or attempt to cause Whiting to lay off or otherwise discriminate against any of its employees in violation of Section 8(a)(3) of the National Labor Relations Act.

WE WILL NOT in any like or related manner restrain or coerce employees of Whiting in the exercise of their right to self-organization, to form, join, or assist unions, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective-bargaining or other mutual aid or protection, or to refrain from such activities, except to the extent that such rights may be affected by an agreement requiring union membership as a condition of employment, as authorized by Section 8(a)(3) of the National Labor Relations Act.

WE WILL eliminate from our collective-bargaining agreement with Whiting any provision requiring preferential treatment of employees on the basis of their membership in or representation by our union prior to being employed by Whiting.

WE WILL, jointly and severally with Whiting, make whole Martin M. Walsh and Lester J. O'Neil for any loss of pay suffered by reason of the discrimination against them.

MILK WAGON DRIVERS & CREAMERY WORKERS UNION, LOCAL 380, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Labor Organization.

Dated_____ By_____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Boston Five Cents Saving Bank Building, 24 School Street, Boston, Massachusetts, Telephone No. Lafayette 3–8100, if they have any question concerning this notice or compliance with its provisions.